UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

ATEN INTERNATIONAL CO., LTD., and ATEN TECHNOLOGY, INC.	)	
Plaintiffs,	)	**Case No. 2:08-cv-00253 -DF**
v.	)	**JURY TRIAL DEMANDED**
EMINE TECHNOLOGY CO., LTD., BELKIN INTERNATIONAL, INC., and BELKIN, INC.	)	
Defendants.	)	

PLAINTIFF ATEN INTERNATIONAL CO., LTD.'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO DEFENDANT EMINE TECHNOLOGY CO., LTD.'S MOTION FOR COSTS

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I. INTRODUCTION

Emine's Reply adds nothing of substance to its unwarranted Motion for Costs. Emine does not dispute that ATEN had a legitimate and reasonable justification for dismissing the prior action, and the law is clear that an award of costs would be unwarranted under those circumstances. Emine has also failed to meet its burden of producing documents to support its extraordinary request for $42,000 in attorneys' fees allegedly incurred in a case in which no discovery took place, no motions were filed, and no hearings were conducted. Finally, Emine suggests that its billing records (which it did not attach) should be reviewed *in camera*. Emine has made no assertion of privilege, and its request for *in camera* review appears to be tailored for no other purpose than to deprive ATEN of the ability to challenge its extraordinary fee request. For the reasons explained below and in ATEN's opposition, Emine's motion and request should be denied.

II. ARGUMENT

A. Emine's Analysis of Rule 41(d) Remains Deficient

Emine makes no serious attempt to distinguish the Sixth Circuit's well-reasoned decision in *Rogers v. Wal-Mart Stores*, Inc., 230 F.3d 868 (6th Cir. 2000), which held that attorneys' fees are not "costs" recoverable under Fed. R. Civ. P. 41(d). Emine instead cites a number of unpublished opinions from other circuits that have no precedential value, and not one of those decisions actually interpret the language of Rule 41(d). *See* Emine Reply at 2 n.11. Emine relies on *Behrle v. Olshansky*, 129 F.R.D. 370 (W.D. Ark. 1991), which the Sixth Circuit declined to follow because it gave "too little weight to the plain language" of Rule 41(d). *See Rogers*, 230 F.3d at 875.

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Emine also continues to rely on two Louisiana district court decisions that are inapposite. *See Henry v. Allstate Ins. Co.*, 2007 U.S. Dist. LEXIS 57822, at *19 n.8 (E.D. La. Aug. 8, 2007) (containing no analysis of whether "costs" include attorneys' fees under Rule 41(d) and citing other federal statute that explicitly allows for award of attorneys' fees); *Fleming v. Joy Fin. Co.*, 1995 U.S. Dist. LEXIS 19106, *2 (E.D. La. Dec. 11, 1995) (relying on Rule 41(a)(2) which allows a court to condition a dismissal "upon such terms and conditions as the court deems proper"). The court in *Fleming* invoked Rule 41(d) only to stay the action until the payment of fees under Rule 41(a)(2) was made. *Id.* at *6. The Court did not rely on Rule 41(d) to award attorneys' fees. *Id.*

B. Emine Does Not Dispute that ATEN's Decision To Dismiss and Re-File Was Logical and Reasonable

Emine's Reply makes no attempt to argue that ATEN lacked a reasonable basis for voluntarily dismissing the prior action. Emine instead argues that Rule 41(d) does not require a showing of bad faith. *See* Emine Reply at 3. This argument misses the point. A motion for costs should be denied when, as here, there is a reasonable explanation for dismissing the prior suit. *See G.C. & K.B. Investments, Inc. v. Fisk*, Nos. 01-1256, 01-2831, 2002 WL 27772, at *7 (E.D. La. Jan. 8, 2002) (denying award of costs where plaintiffs had good reason to dismiss first complaint against one defendant); *Robinson v. Nelson*, No. 98-10802-MLW, 1999 WL 95720, at *2 (D. Mass. Feb. 18, 1999) (denying motion for costs because "plaintiff appears to have had a reasonable explanation for his course of conduct . . . and his actions were not vexatious or designed to gain a tactical advantage").

This case simply does not present the type of conduct Rule 41(d) is designed to deter. ATEN dismissed the California action after it had obtained consent judgments and admissions of infringement from all of the defendants who had ties to the Northern District of California. *See* ATEN Opposition at 2, 5-6. ATEN then re-filed here because of the earlier-filed Belkin action pending in this district, which concerned the same patent and the same Emine-manufactured products. *Id.* ATEN's actions were reasonable and Emine's motion for costs should be denied.

C. *In Camera* Review of Billing Records Would Be Improper and Unfair

ATEN opposes any suggestion by Emine that it may submit billing records for *in camera* review. Emine does not claim that the documents contain privileged information, and absent such a claim, there is no basis to conduct an *in camera* review. *See Vantage Trailers, Inc. v. Beall Corp.*, No. 06-3008, 2008 WL 4093691, at *3 n.2 (S.D. Tex. Aug. 28, 2008) (refusing to consider billing records submitted for *in camera* review); *Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co.*, 129 F.3d 143, 152 (D.C. Cir. 1997) (holding that request for attorneys' fees waives attorney-client privilege with respect to billing statements and rejecting as inadequate *in camera* review of unredacted billing statements); *Essex Builders Group, Inc. v. Amerisure Ins. Co.*, No. 6:04-cv-1838, 2007 WL 700851, at *1-2 (M.D. Fla. Mar. 1, 2007) (holding privilege as to contents of billing records was waived upon placing those records at issue with motion for fees and denying motion to submit the records under seal for *in camera* review). It is therefore improper for Emine to suggest *in camera* review.

In camera review would be particularly unfair in this case because ATEN would not have the opportunity to comment on the propriety of the amounts Emine seeks to collect. At the time the California action was commenced, Emine was already defending itself in the International Trade Commission ("ITC") proceeding concerning the same patent and products. *See* ATEN Opposition Brief at 2. The Docket Sheet in the California action plainly reveals that Emine could not have reasonably incurred any fees – let alone $42,000 – as a result of that action. ATEN suspects that Emine may be using this motion for costs as a pretext to recover fees it expended in the ITC proceeding, which are not recoverable. Emine's request for *in camera* review would leave the Court without a response from ATEN as to the reasonableness or cause of those alleged fees. *See, e.g., United States v. Zolin*, 491 U.S. 554, 571 (1989) ("There is . . . reason to be concerned about the possible due process implications of routine use of in camera proceedings"); *Ideal Elec. Sec. Co.*, 129 F.3d at 151 ("Ideal is entitled to discover the information it requires to appraise the reasonableness of the amount of fees requested by IFIC, including the nature and extent of the work done by IFIC's counsel, *so that it may present to the court any legitimate challenges to IFIC's claim*") (emphasis added); *U.S. Fid. & Guar., Co. v. Neri Construction, LLC,* No. 02-00524, 2006 WL 2792882, at *5 (D. Conn. Sept. 28, 2006) ("The defendants have the right to know precisely what portions of the total attorneys' fees, costs and expenses claimed are attributable to each action").

Emine was clearly obliged to document its request for attorneys' fees and it has failed to meet this burden. *See Louisiana Power & Light Co. v. Kellman*, 50 F.3d 319, 324 (5th Cir. 1995) (determining that the party seeking reimbursement of attorneys' fees has the burden of producing sufficient documentation). The Docket Sheet confirms that practically nothing happened in the California action, and Emine has not provided any evidence to suggest otherwise. Because Emine has failed to meet its burden, and since *in camera* review would be improper, Emine's motion for costs should be summarily denied.

III. CONCLUSION

For the foregoing reasons, ATEN respectfully requests that Emine's motion be denied.

Dated: October 7, 2008

Respectfully submitted,

/s/ Eric H. Findlay

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CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of October, 2008, a true and correct copy of the foregoing instrument was served upon all parties via electronic mail.

/s/ Eric H. Findlay______________
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